Redzuan bin Stapha v Tuan Mazlan bin Tuan Mat & Ors

HIGH COURT (KOTA BHARU) — ELECTION PETITION NO 26 PP-8–06 OF 2013
ZAMANI A RAHIM J
5 SEPTEMBER 2013

Election — Petition — Objections — Failure to comply rr 9 and 34 of the Election Petition Rules 1954 ('Rules') — Failure to comply r 15(4) of the Rules — Whether affidavits of service defective — Failure to plead s 11(1)(b) of the Election Offences Act 1954 — Whether cause of action completed

The present election petition arose from the election for the State Constituency of N32 Gaal, Kelantan which was held on 5 May 2013. In the present proceeding, the first respondent raised three objections, namely, failure by the petitioner's advocates to comply with r 9 and in particular r 34 of the Election Petition Rules 1954 ('the Rules'); the affidavits of service were defective as the petitioner failed to strictly comply with r 15(4) of the Rules; an on an allegation of undue influence and bribery under ss 9(1), 10(a) and s 32 of the Elections Offences Act 1954 ('the Act'), the petitioners failed to plead s 11(1)(b) to constitute a complete cause of action on the grounds of corrupt practice.

Held, allowing the preliminary objection:

(1) The twin rules of rr 9 and 34 of the Rules operate in tandem. Rule 9 deals with the 'Pengesahan Perlantikan Sebagai Peguambela' by the petitioner. Rule 34 relate to the notice of acceptance of the said appointment by an advocate. As to failure to strictly comply with either rr 9 or 34, the petition was liable to be struck off or dismissed. There were unexplained delays which were certainly inconsistent with the word 'immediately' in r 34 which would require an advocate to act promptly upon his or their appointments as advocates by leaving written notice of appointment at the office of the registrar (see paras 9 & 13).

(2) The need to state whether the first respondent address was his usual or last known place of residence or business was found in r 15(1)(b) of the Rules. It was not mandatory requirement of r 15(4). The said affidavit failed to state 'the day of the week' when the documents were served. As a result of failures and omissions in the affidavits of service, r 15(4) had not been strictly complied with. Assuming that there was a valid service of the petition and the notice of presentation of the petition, the petition so served was defective and incomplete. There could be no proper and valid service of the petition which was a condition precedent to the jurisdiction of the court (see paras 23–24).

(3) The petitioner had misread *Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 776. The learned election judge had made an alternative decision. Firstly, the election petition could be dismissed on the ground that it was so fundamentally defective as the petitioner's failure to plead s 11(1)(b) of the Act. Secondly the petition could be dismissed. Therefore, the election petition might be struck off at the preliminary objection stage for failure to plead s 11(1)(b) of the Act (see paras 35 & 37).

[Bahasa Malaysia summary

Petisyen pilihan raya ini berbangkit daripada pilihan raya untuk Kawasan Negeri N32 Gaal, Kelantan yang mana diadakan pada 5 Mei 2013. Dalam prosiding ini, responden pertama membangkitkan tiga bantahan, iaitu, kegagalan oleh peguambela pempetisyen untuk mematuhi peraturan 9 dan terutamanya peraturan 34 Peraturan-Peraturan Petisyen Pilihan Raya 1954 (Peraturan-Peraturan); afidavit-afidavit penyerahan adalah cacat memandangkan pempetisyen gagal untuk mematuhi secara ketat dengan peraturan 15(4) Peraturan-Peraturan; dan atas dakwaan pengaruh tak wajar dan rasuah di bawah s 9(1), 10(a) dan s 32 Akta Kesalahan Pilihan Raya 1954 ('Akta'), pempetisyen gagal untuk memplid s 11(1)(b) untuk membentuk kausa tindakan penuh atas alasan amalan rasuah.

Diputuskan, membenarkan bantahan awalan:

(1) Peraturan-peraturan berkembar peraturan 9 dan 34 Peraturan-Peraturan beroperasi secara seiring. Peraturan 9 merujuk kepada 'Pengesahan Perlantikan Sebagai Peguambela' oleh pempetisyen. Peraturan 34 adalah berkaitan kepada notis penerimaan oleh peguambela. Berkenaan kegagalan untuk mematuhi secara ketat sama ada dengan peraturan 9 atau 34, petisyen tersebut boleh dibatalkan atau ditolak. Terdapat kelewatan yang tidak dijelaskan yang mana sudah tentu tidak konsisten dengan perkataan 'immediately' dalam peraturan 34 yang mana memerlukan peguambela untuk bertindak secara segera selepas perlantikan dia atau mereka sebagai peguambela dengan menyerahkan notis perlantikan bertulis di pejabat pendaftar (lihat perenggan 9 & 13).

(2) Keperluan untuk menyatakan sama ada alamat responden pertama adalah tempat tinggal dia yang biasa atau terakhir atau perniagaan di dapati dalam peraturan 15(1)(b) Peraturan-Peraturan. Ia bukan keperluan mandatori peraturan 15(4). Afidavit tersebut gagal untuk menyatakan 'the day of the week' apabila dokumen diserahkan. Akibat kegagalan dan ketinggalan di dalam afidavit penyerahan, peraturan 15(4) tidak dipatuhi secara ketat. Dengan menganggap bahawa terdapat serahan petisyen yang sah dan notis penyerahan petisyen tersebut, petisyen yang diserahkan adalah cacat dan tidak lengkap. Tidak terdapat penyerahan notis yang betul dan sah yang mana adalah syarat terdahulu kepada bidang kuasa mahkamah (lihat perenggan 23–24).

(3) Pempetisyen telah tersilap tafsir kes *Kho Whai Phiaw v Chong Cheng Jen* [2009] 4 MLJ 776. Hakim pilihan raya yang bijaksana telah membuat keputusan alternatif. Pertama, petisyen pilihan raya boleh ditolak atas alasan bahawa ia pada dasarnya cacat memandangkan kegagalan pempetisyen untuk memplid s 11(1)(b) Akta. Kedua, petisyen boleh ditolak. Oleh itu, petisyen pilihan raya boleh dibatalkan pada peringkat bantahan permulaan kerana gagal untuk memplid s 11(1)(b) Akta (lihat perenggan 35 & 37).]

Notes

For cases on petition in general, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2125–2238.

Cases referred to

Chellappa a/l Kalimuthu v Sime UEP Properties Bhd & Ors [2002] 2 MLJ 209, HC (refd)

Chong Thain Vun v Watson & Anor, Hamid Datun v Majanggil & Anor; Richard E Yap v Tun Datu Mustapha bin Datu Harun [1968] 1 MLJ 65 (refd)

Dayrell Walter Entrie v Datuk Patinggi Tan Sri Alfred Jabu Anak Numpang [2007] 1 MLJ 651; [2007] 7 CLJ 11, HC (refd)

Devan Nair v Yong Kuan Teik [1967] 1 MLJ 261, FC (refd)

Dr Abdul Aziz bin Bari v Mohd Fasiah bin Mohd Fakeh & Ors Election Petition No 26-PP-3–06 of 2013, HC (refd)

Dr Lee Chong Meng v Abdul Rahman bin Haji Abdullah, Returning Officer & Ors (No 2) [2000] 3 MLJ 218, HC (refd)

Dr Shafie bin Abu Bakar v Pegawai Pengurus Pilihan Raya N26 Bangi — Mohd Zikri bin Hj Hussin & Ors and Other Petitions (No 2) [2005] 2 MLJ 149, HC (refd)

Kho Whai Phiaw v Chong Chieng Jen [2009] 4 MLJ 776, FC (refd)

Kong Hong Ming v The Election Commission & Ors [2000] 8 CLJ 262, HC (refd)

LY Swee & Co Ltd, Khoo Leong Kee, Re v LY Swee & Co Ltd [1968] 2 MLJ 104 (refd)

Mohamad Hanafi bin Seman lwn Wan Othman bin Wan Yusoff dan lain-lain [2000] 3 MLJ 482, HC (refd)

Mohd Zaid Ibrahim v P Kalmalanathan P Panchanathan & Ors [2010] 8 CLJ 608, HC (refd)

Norbert Choong Kai Chong & Anor v Mohamed Idris bin Haji Ibrahim & Anor [1980] 1 MLJ 316 (refd)

Wan Zawawi bin Wan Ismail v Ahmad Jazlan bin Yaakub & 2 Ors Election Petition No 26-PP-5–06 of 2013 (refd)

Legislation referred to

Election Offences Act 1954 ss 9(1), (2), 10(a), 11(1)(b), 32(c), 35A

Election Petition Rules 1954 rr 9, 15(1)(b), (2), (3), (4), 34

Mohd Ilias bin Mohd Nor for the petitioner.
Nik Baharum Nik Abdullah (Aznam Mohamed, Mohd Abd Rashid Yah, Mohd Murtadza Mohd Mokhtar, Mohd Yusoff bin Yakob and Shararuddin Mohamed with him) for the first respondent.
Azizan bin Md Arshad (Najib bin Zakaria with him) for the second and third respondents.

Zamani A Rahim J:

[1] There are several authorities to say that the statutory requirement of election laws are mandatory which must be strictly observed, one of such authority is the case of *Mohamad Hanafi bin Seman lwn Wan Othman bin Wan Yusoff dan lain-lain* [2000] 3 MLJ 482 where Zulkefli J (as he then was) at p 496 said:

> Saya ingin menyatakan di sini bahawa kehendak statutori sesuatu petisyen pilihanraya hendaklah dipatuhi dengan ketat dan sepenuhnya kerana pertikaian pilihanraya adalah suatu prosiding statutori yang khas serta khusus dan yang asing kepada undang-undang Commen Law atau ekuiti.

[2] In another illuminating judgment by VT Singham J in *Dr Shafie bin Abu Bakar v Pegawai Pengurus Pilihan Raya N26 Bangi — Mohd Zikri bin Hj Hussin & Ors and Other Petitions (No 2)* [2005] 2 MLJ 149, His Lordship at p 170 said this:

> Election petitions were considered to be defective where there was non-compliance with the mandatory requirements of the Election Offences Act 1954 and the Election Petition Rules 1954 especially by those who are dealing with the drafting and presentation of the petitions (see *Patan Rubis v Patrick Uren & Anor* [1984] 1 CLJ 51 at p 52 para 5). Non-compliance with the mandatory provisions of the election law must necessarily result in a jurisdictional defect and the court has no power to entertain the petition (see *Chong Thain Vun v Watson & Anor*, *Hamid Dasun v Majanggi & Anor*, *Richard E Yap v Tun Datu Mustapha bin Datu Harun* [1968] 1 MLJ 65).

[3] The election petition of the State Constituency of Gaal N32 was scheduled to be heard on 2–5 September 2013, after the respondents' earlier preliminary objections in respect of the Parliamentary Constituency of Bachok P025 and the State Constituency of Jelawat N22 were allowed by this court. I was made to understand that the petitioners in both the said constituencies of Bachok P025 and Jelawat N22 had since filed the appeal to the Federal Court.

[4] Before I could start the business for the day, it was brought to my

attention of the first respondent's letter dated 25 August 2013 raising a new preliminary objections. Having gone through the said first respondent's letter, I noticed that the issues in the current objections were exactly identical to the issues raised in the previous objections in respect of the election petitions of the Parliamentary Constituency of Bachok P025 and the State Constituency of Jelawat N22. To save time and to expedite the matter, I have suggested to the parties to agree and be bound by the decisions of the Federal Court relating to the said Bachok P025 and Jelawat N22 election petitions. However, Encik Azizan bin Md Arshad, senior federal counsel interjected that there must be speedy decision on election petition cases and shall be completed not later than six months from the date of the presentation of such election petition: see s 35A of the Election Offences Act 1954. Upon various suggestions, the parties had finally agreed that the proceeding's be proceeded by way of submitting written submissions, the first respondent to submit the submissions on 2 September 2013, the petitioner, the second and third respondents to file on 3 September 2013. And followed by my decision on 5 September 2013 (that is, today).

[5] There is one other matter which I would like to bring to the attention of the parties herein, that is, the case of *Norbert Choong Kai Chong & Anor v Mohamed Idris bin Haji Ibrahim & Anor* [1980] 1 MLJ 316 which held that:

> Objections to an election petition are issues of law which should be disposed of as preliminary issues for which no notice is required.

See also the case of *Kong Hong Ming v The Election Commission & Ors* [2000] 8 CLJ 262.

[6] In this proceeding, the first respondent raised three objections namely:

(a) failure by the petitioner's advocates to comply with r 9 and in particular r 34 of the Election Petition Rules 1954;

(b) the affidavits of service were defective as the petitioner failed to strictly comply with r 15(4) of the Election Petition Rules 1954; and

(c) on an allegation of undue influence and bribery under ss 9(1), 10(a) and 32(c) of the Election Offences Act 1954, the petitioners failed to plead s 11(1)(b) to constitute a complete cause of action on the grounds of corrupt practice.

[7] Now I propose to deal with each of the objections in turn in the order in which they were raised. I tender my apology for repeating my earlier judgment on Bachok P025 and Jelawat N22 Constituencies, save that there are some amendments, or additions where necessary.

[8] Now the first issue.

Failure by the petitioner's advocates to comply with r 9 and in particular r 34 of the Election Petition Rules 1954

[9] The twin rules of rr 9 and 34 of the Election Petition Rules 1954 operate in tandem. Rule 9 deals with the 'Pengesahan Perlantikan Sebagai Peguambela' by the petitioner. And r 34 relates to the notice of acceptance of the said appointment by an advocate. As to failure to strictly comply with either rr 9 or 34, the petition is liable to be struck off or dismissed. Rule 34 states in peremptory language as follow:

> 34 Notice of appointment of advocates.
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> An advocate shall, *immediately* upon his appointment as such, leave written notice thereof at the office of the Registrar.

[10] The '*Oxford Advanced Learner's Dictionary of Current English* by AS Hornby, (8th Ed) 2010', the word 'immediately' means *without delay, at once*. According to '*Words, Phrases & Maxims, Legally & Judicially Defined* by Anandan Krishnan, Barrister-at-law', describes the meaning of 'immediately' among others as follows: 'It has two meanings one indicating the relation of cause and effect and the other the absence of time between two events. In the former sense, it means proximately, as opposed to 'mediately' without intervention of anything. In the latter sense, it means *at once, in an instant, instantaneously*'.

[11] The first respondent has now questioned the notice of acceptance of the appointment of Encik Abu Bakar As-Sidek and Encik Nor Azli bin Ahamed as the petitioner's advocates vide 'Notis Perlantikan Sebagai Peguambela', *lampiran* 9 dated 26 June 2013. As regard to Datuk Mohd Hafarizam bin Harun and Cik Raihanah Ashriqin bt Ariffin, the notice of acceptance of the appointment as the petitioner's advocates was made vide 'Notis Perlantikan Sebagai Peguambela', *lampiran* 27 dated 7 July 2013.

[12] The petitioner had appointed Mohd Hafarizam bin Harun, Abu Bakar As-Sidek bin Mohd Sidek, Firoz Hussien bin Ahmad Jamaluddin, Syed Faisal bin Syed Abdullah, Badrul Hisham bin Abd Wahap and Nor Azli bin Ahamed as his advocates under r 9 vide 'Pengesahan Perlantikan Peguambela', *lampiran* 4. It was dated 11 June 2013. Nowhere in the said *lampiran* 4 that Cik Raihanah Ashriqin bt Ariffin, was listed among the authorised advocates acting for the petitioner.

[13] As can be seen, the petitioners made the appointment of advocates vide

lampiran 4 on 11 June 2013, but the written notices of acceptance thereof, *lampiran* 9 dated 26 June 2013 and *lampiran* 27 dated 7 July 2013, were not left immediately at the office of the registrar upon their appointment which was on 11 June 2013. There was a delay of 16 days in filing the notice of acceptance of the appointment by Encik Abu Bakar As-Sidek and Encik Nor Azli bin Ahamed. And in respect of Datuk Mohd Hafarizam bin Harun and Cik Raihanah Ahsriqin's acceptance thereof, the delay was even greater, 27 days! These unexplained delays are certainly inconsistent with the word 'immediately' in r 34 which require an advocate to act promptly upon his or their appointments as advocates by leaving written notice of his or their appointments at the office of the registrar. In the instant petition, it is a clear non-compliance of r 34 and in *Dayrell Walter Entrie v Datuk Patinggi Tan Sri Alfred Jabu Anak Numpang* [2007] 1 MLJ 651; [2007] 7 CLJ 11, it was held that:

> In r 34 of the Rules, it was spelt in mandatory terms as was evident by the use of the word 'shall' and the existence of the word 'immediately' the importance for an advocate to act immediately upon his appointment as advocate by leaving written notice of his appointment at the office of registrar in fulfillment of his obligation under r 34 of the Rules.

[14] In my recent decision in the Election Petition No 26-PP-5–06 of 2013 pertaining to Machang Parliamentary Constituency, *Wan Zawawi bin Wan Ismail v Ahmad Jazlan bin Yaakub & 2 Ors*, I had on that occasion said that rr 9 and 34 of the Election Petition Rules 1954 are couched in mandatory terms. Their non-observance are fatal to the petitioner's petition.

[15] Having dealt with r 34, let us revert to r 9 in relation to Cik Raihanah Ashriqin. It would appear that the petitioner had completely disregarded r 9 as the petitioner did not authorise Cik Raihanah Ashriqin to be his advocate, though the notice of acceptance of the appointment as advocate, *lampiran* 27 purportedly made under r 34 was filed in court, albeit a belated filing. There cannot be acceptance by Cik Raihanah Ashriqin without her being appointed as advocate by the petitioner in the first place. Be that as it may, clearly Cik Raihanah Ashriqin has no authority to act for the petitioner under r 9. On the lack of authority to act, reference is made to the case of *Re LY Swee & Co Ltd, Khoo Leong Kee v LY Swee & Co Ltd* [1968] 2 MLJ 104, where at the close of his judgment, Raja Azlan Shah J (as His Majesty then was) said:

> The application to question the lack of authority may be made at any stage in the proceedings, even at the conclusion of the trial (see *Simmons v Liberal Opinion Ltd)*.

[16] The petitioner submitted that the issue of locus standi was an afterthought as the first respondent was fully aware of the advocates representing the petitioner. It is not whether the first respondent was aware of

the advocates representing the petitioner but the objection raised was specifically related to the delay in filing the 'Notis Perlantikan Sebagai Peguambela' by the petitioner. It was not filed immediately upon the appointment of advocate as required under r 34. This is clearly a non-compliance of the mandatory terms of r 34. Thus the petitioner's contention that rr 9 and 34 has been duly complied with is without merit. Further, relying on the decision by Zaleha Yusof J in the Sabak Bernam Election Petition No 26-PP-3–06 of 2013 *Dr Abdul Aziz bin Bari v Mohd Fasiah bin Mohd Fakeh & Ors* the petitioner argues that it is sufficient for the forms under rr 9 and 34 to be filed before the hearing date. I do not agree with this contention as no written judgment is made available to me for my consideration. However, on this issue of locus standi of the petitioner's advocate, the second and third respondents concede that it is a new issue raised by the first respondent, but it will not in any way affect the election petition. As to this contention, it is suffice for me to refer the case of *Dr Shafie bin Abu Bakar*, where His Lordship VT Singham J said, inter alia:

> Non-compliance with the mandatory provisions of the election law must necessarily result in a jurisdictional defect and the court has no power to entertain the petition.

[17] The second issue as follows.

The affidavits of service were defective as the petitioner failed to strictly comply with r 15(4) of the Election Petition Rules 1954

[18] On Monday 1 July 2013, the first respondent had made an official search at the Registry of the High Court in Kota Bharu and found that there was no affidavit of service of this election petition filed by the petitioner.

[19] However, about a month later, a second official search was made by the first respondent on Thursday 1 August 2013, and on this occasion two affidavits of service of the petition were found in the court's file. The first affidavit of service, *Lampiran* 25 was by way of postal service. The affidavit was affirmed by the petitioner, Encik Redzuan bin Stapa on 8 July 2013 and filed the next day on 9 July 2013. The second affidavit of service, *Lampiran* 26 was by way of personal service. The affidavit was affirmed by one Azman bin Muhammad also on 8 July 2013 but filed two days later on 10 July 2013.

[20] The service of notice of the presentation of a petition, accompanied by a copy of the petition is governed by r 15. Rule 15(4) states that:

> An affidavit of service of the document referred to in sub rule 1 stating by *whom* the documents were served, the *day* of the week and the *date* on which the documents were served, *where* they were served, and *how* there were served *must* be filed in the Court in which the petition was presented.

[21] In the case of *Dr Lee Chong Meng v Abdul Rahman bin Haji Abdullah, Returning Officer & Ors (No 2)* [2000] 3 MLJ 218, Augustine Paul J (as he then was) said:

> *Proper service of the petition is a condition precedent to the jurisdiction of the court* (see *Chong Thain Vun v Watson & Anor* [1968] 1 MLJ 65). As *Maxwell on Interpretation of Statues* (11 Ed) says at p 375:
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> Where, however, the act or thing required by the statue is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with, and if it be impossible the jurisdiction fails. It would not be competent for a court to dispense with what the legislature had made the indispensable foundation of its jurisdiction.
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> Jurisdiction cannot be established by consent where it does not exist (see *Federal Hotel Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers* [1983] 1 MLJ 175; *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54). Thus in *Essex Country Council v Essex Incorporated Congregational Church Union* [1963] AC 808 it was held that a Court cannot be given jurisdiction by the waiver of conditions that would otherwise preclude its having jurisdiction. *It is settled law that an objection as to jurisdiction may be taken at any stage of the proceedings* (see *Re Tan Tye, Deed* [1969] 2 MLJ 198). It must be observed that a judgment given without jurisdiction deprives it of any effect (see *Lee Sock Goh v Straits Cabaret* (1953) Ltd [1965] 2 MLJ 3). The person whom the judgment purports to affect has the option either of ignoring it or of going to the court and asking for it to be aside (see *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37; *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393).

[22] Now let us examine the affidavit of service, *lampiran* 25, where the first respondent submitted that the deponent of the affidavit of service in *lampiran* 25, failed to state the first respondent's address at PT 2127, Kampung Padang Siam, 16800 Pasir Putih, Kelantan in the exhibit marked 'RBS1' was fatal. To this, I do not agree. The need to state whether the first respondent's address is his usual or last known place of residence or business is found in r 15(1)(b). It is not the mandatory requirement of r 15(4). The said affidavit, however, failed to state 'the day of the week' the documents were served.

[23] As regard the affidavit of service in *lampiran* 26, the first respondent also said the deponent failed to state 'the day of the week' the documents were served, 'where they were served' and 'how they were served'. These are the mandatory requirements of s 15(4).

[24] As a result of the aforesaid failures or omissions in both the affidavits of service, *lampiran* 25 and 26, r 15(4) had not been strictly complied with. And also, having served the affidavits of service, *lampiran* 26 and 25 on the first respondent on 20 June 2013 and 24 June 2013, a belated filing of both the said

affidavits of service on 9 July 2013 and 10 July 2013 respectively are inconsistent with r 15(4) which employ the word 'must'. The use of the word 'must' relates to the obligation to file affidavit of service coupled with the mandatory requirements pertaining to the contents of the affidavit of service under r 15(4): see *Chellappa a/l Kalimuthu v Sime UEP Properties Bhd & Ors* [2002] 2 MLJ 209. Because of defective affidavit of service, there can be no proper service as it fundamentally affect the jurisdiction of the court. There are plethora of authorities on this issue namely, *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261, *Chong Thain Vun v Watson & Anor, Hamid Datun v Majanggil & Anor; Richard E Yap v Tun Datu Mustapha bin Datu Harun* [1968] 1 MLJ 65 and *Dr Lee Chong Meng*.

[25] It would appear the second and third respondents submissions on the issue of defective affidavit of service is enlightening. In the case of *Mohd Zaid Ibrahim v P Kalmalanathan P Panchanathan & Ors* [2010] 8 CLJ 608, the election court ruled that the personal service of the petition on the first respondent was properly effected when it is clear from the reading of the affidavit of service that there is no doubt that the petition was served on the respondents and the receipt of the petitions was duly acknowledged.

[26] The second and third respondents also say that r 15(2)–(3) are not applicable in this particular situation. These two rules only applicable to the situation where the first respondent is being informed that a letter informing him that a petition by way of pre-paid registered post is addressed to him and the first respondent refuses or neglects to take delivery of that letter or refuses to accept delivery of that letter when tendered to him. It is clear that no such situation arise in this matter.

[27] To conclude, in this case the second and third respondents argue that the first respondent, only disputes the affidavit of service is defective, but not the validity of the service of petition and the notice of presentation of the petition on the first respondent.

[28] Assuming that there is a valid service of the petition and the notice of presentation of the petition, the petition so served is defective and incomplete so as to suffer the *Kho Whai Phiaw*'s defects (I shall deal with this issue after this) it is my considered view that there can be no proper and valid service of the petition which is a condition precedent to the jurisdiction of the court: see *Chong Thain Vum v Watson & Anor* [1968] 1 MLJ 65.

[29] Now we come to the third issue.

On the allegation of undue influence and bribery under ss 9(1), 10(a) and 32(c) of the Election Offences Act 1954, the petitioner's failed to plead s 11(1)(b) to constitute a complete cause of action on the grounds of corrupt practice

[30] Having examined the election petition filed by the petitioner, *lampiran* 1, where the petitioner pleaded as follows:

(a) para 1 at p 4 — the offence of bribery (Part 111) under s 10(a) read together with s 32(c) of the Election Offences Act 1954; and

(b) para 3 at p 7 — the offence of undue influence (Part 111) under s 9(1)–(2) read together with s 32(c) of the Election Offences Act 1954.

[31] On the allegation of undue influence and bribery under ss 9(1), 10(a) and 32(c) of the Election Offences Act 1954 which makes the offence of corrupt practice, the petitioner failed to plead s 11(1)(b) to constitute a complete cause of action on the ground of corrupt practices. In the Federal Court case of *Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 776, on the requirement to incorporate and to plead s 11(1)(b) to provide the essential connection link to constitute the cause of action, the election judge, Clement Skinner J had this to say:

> Counsel for the respondent contends that while ss 9(1) and 10(a) of the Act define the offence of undue influence and bribery respectively, it is s 11(1) (b) of the Act which makes undue influence and bribery the offence of corrupt practice. Therefore to constitute a complete cause of action on the ground of corrupt practice in this case, the petitioner must plead the requisite sections, namely, ss 9(1) or 10(a) and ss 11(1)(b) and 32(c) since they are relevant sections which define the particular type of corrupt practice complained of, makes the particular offence a corrupt practice, and which allows for the avoidance of the election on that ground. Since the petitioner did not do so the respondent contends that all the charges in the petition have been rendered incomplete and defective and so the election petition should be dismissed for failing to comply with the strict requirements of r 4(1)(b) of the Election Petition Rules 1954 which requires an election petition to 'briefly state the facts and grounds relied on to sustain the prayer'.

[32] On appeal to the Federal Court, Alauddin PCA (as he then was) who delivered the judgment of the court had agreed with the election judge that the charges were fundamentally defective and they should be dismissed on that ground alone.

[33] His Lordship went on to say:

> Without the reliance on *s 11* which makes bribery an offence of corrupt practice, there is an essential missing link between ss 10(a) and 32(c) because s 10(a) merely defines what is bribery, and it is s 32(c) which enacts corrupt practice as a ground to avoid the election. To make good a charge under s 32(c) which concerns corrupt practice, *s 11 is therefore a mandatory requirement to provide the essential connection link to constitute the cause of action*.

[34] On this third issue, the petitioner argues that the first respondent is fully aware of the decision in *Kho Whai Phiaw*, and is now raising it as an afterthought after subsequent decisions by other election judges on the requirement to plead s 11(1)(b) in the petition. Further, the petitioner argues that *Kho Whai Phiaw*, was a case decided after full trial and not at a preliminary objection stage. It was also asserted that the first respondent failed to cite an authority on the point that failure to plead s 11 will result in the petition being struck out at the preliminary objection stage. Thus, according to the petitioner, *Kho Whai Phiaw*'s case, is distinguishable on facts and law. However the second and third respondents agree that this third issue is regarded as a point of law, it may therefore be considered as a new issue and this court must decide on it.

[35] Be that as it may, I am of the view that the petitioner has misread *Kho Whai Phiaw*. The answer can be found in the case of *Kho Whai Phiaw*, itself where the learned election judge, Clement Skinner J said, inter alia:

> On the contrary, in a case such as this, where the alleged corrupt practice is the only basis or ground relied on by the petitioner to avoid the election, since it is s 11(1)(b) that makes undue influence and bribery a corrupt practice, upon which ground the respondent's election may be avoided, the petitioner's failure to plead s 11(1)(b) renders the charges defective and incomplete. The petitioner has failed to relate the complaints with the provisions of the election laws the respondent is alleged to have transgressed (see *Wan Daud Bin Wan Jusoh v Mohd bin Ali & Anor* [1988] 2 MLJ 384). *This has rendered the election petition so fundamentally defective that it should be dismissed on this ground alone. In case I am wrong in what I say, I now go on to consider the charges*.

[36] As stated in the above passage, the election petition can be dismissed *on this ground alone*. On this ground alone refers to the petitioner's failure to plead s 11(1)(b) in the election petition. This ground of dismissal of the election petition was affirmed by Alauddin PCA (as he then was) on appeal to the Federal Court. This is how His Lordship put it:

> Having said the above we are of the opinion that the LEJ is absolutely right to hold that the charges were fundamentally defective and they should be dismissed *on that ground alone. We agree with the LEJ*.

[37] Thus in *Kho Whai Phiaw*, the learned election judge has made an

alternative decision. Firstly, the election petition can be dismissed on the ground that it is fundamentally defective as the petitioner's failure to plead s 11(1)(b). Secondly, the petition can be dismissed as none of the five charges pleaded against the respondent were proved beyond reasonable doubt. Therefore the election petition may be struck off at the preliminary objection stage for failure to plead s 11(1)(b) when the allegation of undue influence and bribery against the respondent is raised. It is obvious that the learned election judge in *Kho Whai Phiaw*, is being cautious in his judgment as in case he was wrong in his decision on account of failure to plead s 11(1)(b), His Lordship proceeded further to make an alternative ground of decision that the charges were not proven. The petition was also dismissed on this ground.

[38] Having considered all the three issues raised, either individually or cumulatively, I am of the considered view that there are merit in the first respondent's current objections. I have, therefore, no qualm to allow the first respondent's preliminary objections. And accordingly, I dismiss/strike out the election petition of the State Constituency of Gaal N32 with costs.

[39] As regard costs, the first respondent has prayed for a cost of RM50,000. However the second and third respondents have prayed for a cost of RM100,000 should this court allowed the preliminary objection and struck off the election petition. This is in view that preparation and getting up for the trial of this election petition has been carried out by the second and third respondents. The petitioner suggested a cost of RM30,000, similar to the cost awarded in Bachok P025 and Jelawat N22.

[40] In the light of the above, as between the first respondent and the petitioner, the petitioner is to pay the costs of RM30,000 to the first respondent.

[41] As between the second and third respondents and the petitioner, the petitioner is to pay each of the second and third respondent the sum of RM25,000 (making a total of RM50,000).

Preliminary objection allowed.

Reported by Afiq Mohamad Noor